

Lewis R. Landau (CA Bar No. 143391)
Attorney-at-Law
22287 Mulholland Hwy., # 318
Calabasas, California 91302
Voice & Fax: (888) 822-4340
Email: Lew@Landaunet.com

Attorney for Platinum Loan Servicing, Inc.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re
FRE 355 Investment Group, LLC,

Debtor.

Case No.: 20-50628 SLJ 11
Cases Jointly Administered
Chapter 11
Case No.: 20-50631 SLJ 11

**REPLY IN SUPPORT OF MOTION FOR
RELIEF FROM STAY;
EVIDENTIARY OBJECTIONS**

In re
Mora House, LLC,

Debtor.

Date: September 29, 2020
Time: 1:30 p.m.
Place: Courtroom 9 (Telephonic)
US Bankruptcy Court; Judge Johnson
280 South First Street
San Jose, California 95113

Platinum Loan Servicing, Inc. (“PLS”) as servicing agent for the beneficiaries of the mortgages on the real property owned by FRE 355 dba FRE 355 Investment Group, LLC (“FRE 355”) and Mora House, LLC (“Mora House”) (FRE 355 and Mora House are collectively referred to as “Debtors”), herein files its reply to the Opposition to Motion for Relief From Stay [ECF # 96] pursuant to the Court’s August 13, 2020 Order Continuing Hearing on PLS’s Motion for Relief From Stay [ECF # 81] (“RFS Continuance Order”).

For all these reasons, the Court should grant the motion.

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1 \$135,000 in interest plus late fees and costs. Disappointingly, the Court is still “flying blind”
2 because the Debtors have done nothing more than file restated declarations by LLC member
3 Melvin Vaughn (“Vaughn”) and broker Phil Chen (“Chen”). Notwithstanding the Court’s
4 admonition that “valuation appears critical and Debtors should be mindful that a conclusion of
5 value may be case-determinative” the Debtors still fail to offer any competent appraisal evidence
6 and instead offer multiple excuses for not doing so. ***Debtors’ excuses do not provide adequate***
7 ***protection or an equity cushion to protect PLS’s investors and the Court must grant one or both***
8 ***of PLS’s motions forthwith so that PLS may protect its substantial interest in its collateral.***

9 PLS continues its objection to the evidentiary admission of the Chen declaration as expert
10 testimony to prove value. The trial judge must act as the gatekeeper for expert testimony by
11 carefully applying Federal Rule of Evidence (“FRE”) 702 to ensure specialized and technical
12 evidence is “not only relevant, but reliable.” Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579,
13 589 & n. 7 (1993); *accord* Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147 (1999)
14 (observing that *Daubert* imposes a special “gatekeeping obligation” on the trial judge). An expert
15 witness may testify “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is
16 the product of reliable principles and methods, and (3) the witness has applied the principles and
17 methods reliably to the facts of the case.” Fed. R. Evid. 702. The proponent of the evidence bears
18 the burden of proving that the expert’s testimony satisfies FRE 702. Cooper v. Brown, 510 F.3d
19 870, 880 (9th Cir. 2007).

20 Here, Debtors’ opposition utterly fails to establish that the three critical standards are met
21 for the admission of expert valuation testimony. *See* Federal Rules of Evidence 104, 602, 701,
22 702, 703; Donoway v. Tucker (In re Donoway), 139 B.R. 156, 157 (Bankr. D. Md. 1992) (“Real
23 estate brokers and agents without specialized training in real estate appraising are not qualified to
24 testify as to their opinions regarding fair market value”). Here, Chen offers no foundation
25 showing specialized training in real estate appraising, that the testimony is based upon sufficient
26 facts or data, that any generally recognized appraisal principles were followed and that the opinion
27 is the product of those methods. *See* <http://www.uspap.org/> (Uniform Standards of Professional
28 Appraisal Practice).

1 In its Continuance Order the Court cites In re Morse, 2018 WL 6721090, *6 (Bankr. N.D.
2 N.Y. December 20, 2018) for the proposition that “the Court should not categorically reject a
3 broker’s opinion of value . . . [a]s an evidentiary matter, . . . it comes down to the weight to assign
4 to such testimony and opinion.” Morse relies upon the Pichardo decision in recognizing that:

5 an assessment of the fair market value of a real estate parcel by an appraiser carries
6 greater weight than that of a real estate broker who does not have the same
7 specialized training. While a broker relies upon his sales experience, a broker is not
8 instructed in his or her valuation opinion by the industry standards and uniform
guidelines to which a competent appraiser must adhere in preparing an appraisal
and rendering an opinion of value.

9 In re Pichardo, 2013 Bankr. LEXIS 1325, at *11 (Bankr. D. R.I. Apr. 3, 2013).

10 Thus, even under the reasoning of Morse which does not categorically bar the admission of
11 a broker’s opinion of value, the Debtors have not carried their burden of proof herein because the
12 valuation offered by PLS in the Hart Declaration carries greater weight than the Debtors’
13 valuations. Debtors have also not identified any irregularities or inaccuracies that would lessen
14 the weight to be granted the Hart Declaration as professional appraisal testimony by a licensed
15 appraiser. Id. at 13 (“If, for example, a licensed appraiser’s appraisal contains material
16 irregularities or inaccuracies, it should be afforded less weight than that of a broker.”).

17 Chen and Vaughn also suffer from a conflict of interest in offering valuation testimony as
18 each has an interest in the outcome of their valuation opinion. Chen is not a disinterested third
19 party broker that provided a valuation opinion. Instead, he has a direct financial stake in selling
20 the properties as the estate’s broker and is offering his valuation to preserve his listing
21 opportunity. *See* ECF #s 53-59. Vaughn also has a direct financial stake in overvaluing the
22 properties based on his equity interest in the estates. These financial interests are disqualifying.
23 “Federal courts have the inherent power to disqualify expert witnesses to protect the integrity of
24 the adversary process, protect privileges that otherwise may be breached, and promote public
25 confidence in the legal system.” *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092
26 (N.D. Cal. Aug. 10, 2004). Allowing witnesses with a direct financial stake in their testimony to
27 opine on valuation should result in disqualification to protect the integrity of the adversary
28 process.

1 For all these reasons, the Debtors have failed to carry their burden of rebutting PLS's
2 valuation testimony proving the real properties do not exceed \$13,250,000 in value. Based upon
3 senior liens as identified in the motion and the accrued status of PLS's loan, PLS lacks adequate
4 protection, Debtors have no equity and relief from stay should be granted under 11 U.S.C. §
5 362(d)(1), (d)(2) and (d)(3).

6 **II.**

7 **DEBTORS' UNADJUDICATED AND FACILE OBJECTION TO CLAIM**
8 **DOES NOT UNDERMINE THE OVER \$13 MILLION TOTAL TO PLS'S CLAIM;**
9 **EVEN IF TRUE, PLS STILL LACKS ADEQUATE PROTECTION**
10 **AND DEBTORS HAVE NO EQUITY IN THE PROPERTIES**

11 On September 1, 2020, in a further attempt to muddy the record based on procedural
12 obfuscation, Debtors filed an unsubstantiated objection to PLS's claim contending that the
13 approximately \$13,300,000 claim should be reduced by almost \$2 million to \$11,338,000. The
14 argument is so lacking in credibility that the Court should immediately become suspect of the
15 Debtors' good faith in these proceedings. However, even if the objection to claim is assumed
16 correct (which it clearly is not), PLS still lacks adequate protection and Debtors still lack equity in
17 the properties due to the \$2.5 million senior Blanchard lien and \$275,000 in property taxes based
18 on the only creditable valuation evidence of \$13,250,000.

19 Notwithstanding the foregoing, PLS can quickly establish the meritless nature of Debtors'
20 objection to claim based on very simple calculations of accrued interest and late fees:

- 21 1. Undisputed principal balance: **\$10,937,000**. Debtors paid the loan through 6/30/19,
22 although default interest based on defaulted payments commenced 2/1/19;
- 23 2. 10% interest 8/1/19 to 9/22/20: **\$1,275,812.17**;
- 24 3. Late charges 10% on installments due 12/1/18 to 9/1/20: **\$205,071.59**;
- 25 4. Default interest + 5% 2/1/19 to 9/1/20: **\$820,274.94**;
- 26 5. Additional late fees on default interest: **\$86,584.52**;
- 27 6. Misc. charges foreclosure trustee and attorney's fees: **\$103,000**.

1 Debtors offer no substantive dispute to the foregoing accruals and do not challenge PLS's
2 entitlement to default interest per the PLS note. Even ignoring all charges for foreclosure trustee
3 and attorney's fees, the loan accruals still exceed \$13 million. Debtors' objection to claim is
4 meritless.

5 **III.**

6 **CONCLUSION**

7 For all the reasons set forth above, PLS respectfully requests entry of an order granting
8 relief from stay under 11 U.S.C. § 362(d)(1), (d)(2) and (d)(3) and dismissing Debtors' cases
9 under 11 U.S.C. § 1112(b).

10 Dated: September 22, 2020

Lewis R. Landau
Attorney-at-Law

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12 By: /s/ Lewis R. Landau
13 Lewis R. Landau
14 Attorneys for Movant
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1. I am the Chief Executive Officer of Platinum Loan Servicing, Inc. (“PLS”) and have personal knowledge of the facts set forth herein.

3. I am readily familiar with PLS's books and records for servicing the Note. The total amount due on the Lenders' loan as of September 22, 2020 is at least **\$13,427,741** with interest accruing at the rate of \$4,571.30 per day thereafter and additional costs. The following accurately states the amounts accruing and due for the subject time periods:

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f. Misc. charges foreclosure trustee and attorney's fees: **\$103,000.**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 22nd day of September 2020 at Los Angeles, California.



Scot Fine

1 **CERTIFICATE OF SERVICE**

2 I am employed in the County of Los Angeles, California. I am over the age of eighteen
3 (18) years and not a party to the within entitled cause, my business address is 22287 Mulholland
4 Hwy., # 318, Calabasas, CA 91302.

5 On September 22, 2020 I served a true and correct copy of the following documents:

6 **REPLY IN SUPPORT OF MOTION FOR RELIEF FROM STAY;
7 EVIDENTIARY OBJECTIONS**

8 by effecting electronic delivery upon such persons that have agreed to accept service through the
9 Court's CM/ECF electronic noticing system as follows:

10 Bernard S. Greenfield on behalf of Creditor Richard Blanchard
bgreenfield@greenfieldlaw.com, ckaefer@greenfieldlaw.com
11 Robert G. Harris on behalf of Debtor FRE 355 Investment Group, LLC
rob@bindermalter.com
12 Lewis R. Landau on behalf of Creditor Platinum Loan Servicing, Inc.
lew@landaunet.com
13 Michael W. Malter on behalf of Debtor FRE 355 Investment Group, LLC
michael@bindermalter.com
14 Office of the U.S. Trustee / SJ
USTPRegion17.SJ.ECF@usdoj.gov
15 Suhey Ramirez on behalf of U.S. Trustee Office of the U.S. Trustee / SJ
suhey.ramirez@usdoj.gov, Patti.Vargas@UST.DOJ.GOV
16 Julie H. Rome-Banks on behalf of Debtor FRE 355 Investment Group, LLC
julie@bindermalter.com
17 Jennifer C. Wong on behalf of Creditor Wells Fargo Bank, N.A.
bknotice@mccarthyholthus.com, jwong@ecf.courtdrive.com
18

19 I declare under penalty of perjury under the laws of the United States of America that the
20 foregoing is true and correct.

21 Executed this 22nd day of September 2020 at Los Angeles, California.

22
23 /s/ Lewis R. Landau
24 Lewis R. Landau
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